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9 IN THE UNITED STATES DISTRICT COURT

10 FOR THE NORTHERN DISTRICT OF CALIFORNIA

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12 KFD ENTERPRISES, INC.,

No. C 08-4571 MMC

13 Plaintiff,

14  
15 **ORDER GRANTING IN PART AND  
DENYING IN PART MULTIMATIC LLC  
AND THE KIRRBERG CORPORATION'S  
MOTION FOR SUMMARY JUDGMENT**

v.

16 CITY OF EUREKA, et al.,

17 Defendant.

18 And Related Counterclaims, Cross-claims,  
19 and Third-Party Claims.

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21 Before the Court is Multimatic LLC and The Kirrberg Corporation's (collectively,  
22 "Multimatic") "Motion for Summary Judgment as to Plaintiff KFD Enterprises, Inc.'s Fourth  
23 Amended Complaint ["4AC"]," filed June 1, 2012. KFD Enterprises, Inc. ("KFD") has filed  
24 opposition, to which Multimatic has replied. Having read and considered the papers filed in  
25 support of and in opposition to the motion, the Court rules as follows.<sup>1</sup>

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<sup>1</sup> On December 4, 2012, the Court took the matter under submission and vacated  
the hearing scheduled for December 7, 2012.

1           **1. Claims One (“Cost Recovery Pursuant to CERCLA § 107(a)”) and Three**  
 2           **(“Hazardous Substance Statutory Indemnity”)**

3           With respect to its First and Third Claims for Relief, KFD asserts Multimatic is liable  
 4 as an arranger for the disposal of hazardous waste.

5           CERCLA imposes arranger liability on “any person who by contract, agreement, or  
 6 otherwise arranged for disposal . . . of hazardous substances owned or possessed by such  
 7 person, by any other party or entity, at any facility . . . owned or operated by another party  
 8 or entity and containing such hazardous substances . . . .” 42 U.S.C. § 9607(a)(3).<sup>2</sup> A  
 9 party “may qualify as an arranger . . . when it takes intentional steps to dispose of a  
 10 hazardous material.” See Team Enterprises, LLC v. W. Inv. Real Estate Trust, 647 F.3d  
 11 901, 908 (9th Cir. 2011) (omission in original). “[T]o satisfy the intent requirement, a  
 12 company selling a product that uses and/or generates a hazardous substance as part of its  
 13 operation may not be held liable as an arranger under CERCLA unless the plaintiff proves  
 14 that the company entered into the relevant transaction with the *specific purpose* of  
 15 disposing of a hazardous substance.” See id. at 909 (emphasis in original).

16           Here, it is undisputed that KFD used a Multimatic Solo Plus machine in its dry  
 17 cleaning operations, the instruction manual for which stated the following: “Waste water  
 18 must flow into an open drain.” (See 4AC Ex. F at KFD01975.) It is also undisputed that  
 19 during the operation of said machine, PCE-containing wastewater was produced and KFD  
 20 disposed of said wastewater down a floor drain. (See Smith Dec. Ex. B at 54:21-55:5.)  
 21 Based on said evidence, KFD argues Multimatic had the requisite intent to dispose of a  
 22 hazardous substance. KFD’s reliance on the manual, however, is misplaced. See Team  
 23 Enterprises, 647 F.3d at 908 (holding “[w]hile actions taken with the *intent* to dispose of a  
 24 hazardous substance are sufficient for arranger liability, actions taken with the mere

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 27           <sup>2</sup> The definition of “arranged” is the same under both CERCLA and the HSAA .  
 28           See Cal. Health & Safety Code § 25323.5(a) (“Responsible party” or ‘liable person,’ for the  
                  purposes of this chapter, means those persons described in [CERCLA] (42 U.S.C. Sec.  
                  9607(a)).”).

1 knowledge of such future disposal are not") (emphasis in original). Put another way, KFD  
 2 was required to show, and has not shown, that when Multimatic sold the equipment in  
 3 question, Multimatic's "probable purpose for entering into such a transaction [was] to  
 4 dispose of hazardous waste." See id. at 907-08 (emphasis in original) (noting "[a]rranger  
 5 liability ensures that owners of hazardous substances may not free themselves from liability  
 6 by selling or otherwise transferring a hazardous substance to another party for the purpose  
 7 of disposal").

8 KFD's alternative theory, that Multimatic exercised control over the disposal process,  
 9 likewise fails. See Team Enterprises, 647 F.3d at 910 ("Arranger liability premised upon a  
 10 party's control over the disposal process is well established."). The sole evidence offered  
 11 by KFD in support of such argument is the above-referenced language from Multimatic's  
 12 instruction manual. Such evidence is insufficient to establish control. See id. (holding, for  
 13 purposes of arranger liability, "instruction manuals are akin to recommendations and,  
 14 therefore, do not control the actions of the purchaser").

15 Accordingly, Multimatic is entitled to summary judgment on KFD's First and Third  
 16 Claims for Relief.

17 **2. Claims Seven ("Continuing Private Nuisance") and Eight ("Continuing  
 18 Public Nuisance")**

19 Entities or persons "who create or assist in creating a system that causes  
 20 hazardous wastes to be disposed of improperly, or who instruct users to dispose of wastes  
 21 improperly, can be liable under the law of nuisance."<sup>3</sup> See City of Modesto Redevelopment  
22 Agency v. Superior Court, 119 Cal. App. 4th 28, 40-41 (2004) (reversing summary  
 23 judgment in favor of manufacturers of dry-cleaning equipment where manufacturers  
 24 "instructed the dry cleaners to set up their equipment to discharge solvent-containing  
 25 wastewater into the drains"; see also Selma Pressure Treating C. v. Osmose Wood

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 27 <sup>3</sup> The issues raised by the instant motion are the same for both private and public  
 28 nuisance.

1 Preserving Co., 221 Cal. App. 3d 1601, 1620 (1990) (finding complaint sufficiently pleaded  
 2 claim for nuisance where equipment installer “recommended an unlined dirt pond be  
 3 created for the receipt of . . . waste products”).<sup>4</sup> Here, as noted, Multimatic’s instruction  
 4 manual included the following direction to users: “Waste water must flow into an open  
 5 drain.”<sup>5</sup> (See 4AC Ex. F at KFD01975); see also Team Enterprises, 647 F.3d at 912  
 6 (distinguishing City of Modesto where manual instructed user to pour PCE-containing  
 7 wastewater into bucket; noting “there [was] no evidence in the record that [defendant]  
 8 instructed dry cleaners to set up their equipment to discharge solvent-containing  
 9 wastewater into the drains and sewers”) (internal quotation and citation omitted).

10 Accordingly, Multimatic is not entitled to summary judgment on KFD’s Seventh and  
 11 Eighth Claims for Relief.

12 **3. Claim Nine (“Continuing Public Nuisance Per Se”)**

13 A party is liable for nuisance per se when the “activity or circumstance at issue [is]  
 14 expressly declared to be a nuisance by its very existence by some applicable law.” City of  
 15 Claremont v. Kruse, 177 Cal. App. 4th 1153, 1163 (2009) (internal quotation and citation  
 16 omitted). In particular, “[w]ater pollution occurring as a result of treatment or discharge of  
 17 wastes in violation of Water Code section 13000, et seq. is a public nuisance per se.” See  
 18 Newhall Land & Farming Co. v. Superior Court, 19 Cal. App. 4th 334, 341 (1993); see also  
 19 Cal. Water Code § 13304 (providing for liability of any person “who has caused or permitted  
 20 . . . any waste to be discharged . . . into the waters of the state and creates or threatens to  
 21 create a condition of pollution or nuisance”). As noted, Multimatic’s manual instructed  
 22 users to dispose of waste “into an open drain.” (See 4AC Ex. F at KFD01975).

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 24 <sup>4</sup> The Court is not persuaded by Multimatic’s citation to Hinds Investments v. Angioli,  
 25 445 Fed. Appx. 917 (9th Cir. 2011), an unpublished memorandum disposition, given the  
 paucity of facts provided therein.

26 <sup>5</sup> The record does not support Multimatic’s argument that KFD lacks evidence  
 27 showing KFD relied on the instruction manual. (See Greben Decl. Ex. C at 438:8-18  
 28 (deposition testimony of Kenneth Daer (“Daer”) stating he and instructor consulted above-  
 referenced manual during training process); see also Smith Decl. Ex. B at 54:21-55:5  
 (deposition testimony of Daer stating wastewater was disposed of down floor drain).)

1 Consequently, Multimatic may be found liable for violating § 13304 the California Water  
 2 Code. See City of Modesto, 119 Cal. App 4th at 41-43 (reversing summary judgment in  
 3 favor of manufacturers on claim predicated on § 13304 where manufacturers instructed dry  
 4 cleaners “to discharge solvent-containing waste water into the drains and sewers”).

5 Accordingly, Multimatic is not entitled to summary judgment on KFD’s Ninth Claim  
 6 for Relief.

7 **4. Claim Ten (“Continuing Trespass”)**

8 “Where the owner of property voluntarily places a product on the property and the  
 9 product turns out to be hazardous, the owner cannot prosecute a trespass cause of action  
 10 against the manufacturer of that product because the owner has consented to the entry of  
 11 the product onto the land.” See County of Santa Clara v. Atl. Richfield Co., 137 Cal. App.  
 12 4th 292, 315 (2006)). Here, the evidence is undisputed that the dry cleaning machine was  
 13 on the subject property with KFD’s consent, and, contrary to KFD’s argument, the issue is  
 14 not whether KFD consented “to the contamination resulting from Multimatic’s equipment.”  
 15 (See Opp’n at 14:23-24); County of Santa Clara, 137 Cal. App. 4th at 315 (holding plaintiffs’  
 16 “lack of knowledge” of product’s “dangerous propensities does not vitiate their consent to  
 17 the placement of the [product] on their properties, though it may make that consent  
 18 uninformed”).

19 Accordingly, Multimatic is entitled to summary judgment on KFD’s Tenth Claim for  
 20 Relief.

21 **5. Claims Twelve (“Strict Liability”) and Thirteen (“Negligence”)**

22 Multimatic argues KFD’s claims for strict liability and negligence fail for the reason  
 23 that the 4AC alleges<sup>6</sup> only economic loss, not physical injury to person or property. See  
 24 County of Santa Clara, 137 Cal. App. 4th at 318 (holding “economic loss alone, without

25 physical injury, does not amount to the type of damage that will cause a negligence or strict  
 26 liability cause of action to accrue”). Contrary to Multimatic’s argument, however, the 4AC

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 28 <sup>6</sup> As to these two claims, Multimatic bases its argument solely on the pleadings, and  
 KFD’s response likewise is based solely on the pleadings.

1 does allege the requisite physical injury. (See 4AC ¶22(b)(5) ("Wastewater produced by  
2 the Multimatic machine also injured fixtures on the Property by causing corrosion of the  
3 plumbing and pipes at and underlying the Property."); see also *id.* ¶¶ 103, 111  
4 (incorporating by reference all preceding paragraphs).)<sup>7</sup>

5 Accordingly, Multimatic is not entitled to summary judgment on KFD's Twelfth and  
6 Thirteenth Claims for Relief.

7 **6. Claims Four ("Equitable Indemnity"), Five ("Common Law Contribution"),  
8 and Six ("Declaratory Relief")**

9 The only basis asserted by Multimatic for summary judgment in its favor on the  
10 Fourth, Fifth, and Sixth Claims for Relief is Multimatic's lack of liability with respect to any  
11 other claim. As discussed above, Multimatic has not shown it is entitled to relief on KFD's  
12 Seventh, Eighth, Ninth, Twelfth, and Thirteenth Claims for Relief.

13 Accordingly, Multimatic is not entitled to summary judgment on KFD's Fourth, Fifth,  
14 and Sixth Claims for Relief.

15 **CONCLUSION**

16 For the reasons stated above, Multimatic's motion for summary judgment is hereby  
17 GRANTED in part and DENIED in part.

18 1. To the extent Multimatic seeks summary judgment in its favor on KFD's First,  
19 Third, and Tenth Claims for Relief, the motion is GRANTED.

20 2. In all other respects, the motion is DENIED.

21 **IT IS SO ORDERED.**

22 Dated: December 14, 2012

  
MAXINE M. CHESNEY  
United States District Judge

24  
25 <sup>7</sup> In support of its motion, Multimatic has not raised an issue as to KFD's failure to  
26 plead ownership of the property alleged to have suffered damage. See California Dept. of  
Toxic Substances Control v. Payless Cleaners, 368 F. Supp. 2d 1069, 1084 (E.D. Cal.  
27 2005) (noting, to adequately allege strict liability and negligence, plaintiff must allege "injury  
to its property"; finding plaintiffs "may recover for the damage caused to their own  
property").